



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of: ----- SSN: ----- Applicant for Security Clearance)))))))	ISCR Case No. 09-06771
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Appearances

For Government: Kathryn D. MacKinnon, Esq., Department Counsel
For Applicant: *Pro se*

October 6, 2010

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

On May 10, 2010, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) enumerating security concerns arising under Guideline F (Financial Considerations). DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG).

In a May 14, 2010, answer to the SOR, Applicant admitted one of the two allegations set forth under Guideline F and requested a hearing before an administrative judge. DOHA assigned the case to me on August 10, 2010. The parties proposed a hearing date of August 31, 2010. A notice setting that date for the hearing was issued on August 13, 2010. I convened the hearing as scheduled. Applicant gave testimony and offered three documents which were accepted into the record without objection as exhibits (Exs.) A-C. The Government introduced six documents that were accepted into the record without objection as Exs. 1-6. Applicant was given until September 17, 2010, to submit additional documents through Department Counsel. Department Counsel was given until September 25, 2010, to forward any received

documents to me and note any objections to their contents. On September 25, 2010, Department Counsel forwarded three additional files, received between September 2, 2010, and September 20, 2010, respectively, and noted no objection to the materials. Those documents were accepted as Exs. D-F and the record was closed. Based on a thorough review of the testimony, submissions, and exhibits, I find Applicant failed to meet his burden regarding the security concerns raised. Security clearance denied.

Findings of Fact

Applicant is a 41-year-old vice president of a company that he and his sister established in 2002. He has a high school diploma. Applicant is married and has six children. The SOR has two allegations under financial considerations, allegations ¶¶ 1.a-1.b. First, it is alleged that Applicant is indebted to a mortgage company on a mortgage account that is past due in the approximate amount of \$46,429. This account is shown as being in foreclosure status with a total loan balance of \$391,488. Applicant denied this allegation. Second, it is alleged that Applicant is indebted to a law firm for an account placed in collection by a telecommunications entity in the approximate amount of \$985. Applicant admitted this allegation.

The property at issue in SOR allegation ¶ 1.a was an investment property located in a popular resort city. Applicant purchased the property in February 2006 with the intent that he could “flip” the property and make a profit.¹ It was not purchased as a personal residence, but at one point it was leased at a rent insufficient to cover the monthly mortgage payments. He listed the property, which he purchased for about \$490,000, for sale.² It attracted some interest, but no one bought the property. Then the local real estate market collapsed.³ At the end of 2008, Applicant realized that he could no longer manage the monthly maintenance dues of about \$600-\$700 and the monthly mortgage payments of about \$3,000.⁴

Applicant’s difficulty in making these monthly payments was business related. His company had been working as a vendor with a well-known defense contractor.⁵ The contractor lost its contract, and Applicant’s company started working with the new awardee between 2007 and 2008. The transition was not smooth and Applicant’s

¹ Tr. 14, 22. The property was purchased by Applicant, his sister, and their mother, but the mortgage at issue was taken solely in Applicant’s name. Applicant testified, but failed to substantiate, that a second mortgage on that property was in Applicant’s mother’s name. Tr. 34-35. Applicant had prior success in buying and reselling properties. See Tr. 25.

² Tr. 21, 36. The primary mortgage was for \$390,000. The second mortgage was for \$100,000.

³ Tr. 21. Applicant noted: “[I]f you watch the news, you’ll see, there’s an incredible inventory of condos [there] and people are selling them at 50 percent off.” It is noted that the local real estate market at issue is still suffering.

⁴ Tr. 15.

⁵ *Id.*

company's annual income dropped from approximately \$800,000 to under \$400,000.⁶ As a result, Applicant's income dropped from about \$140,000 a year to about \$56,000 in 2008.⁷

With the property not attracting *bona fide* offers and his finances reduced, Applicant repeatedly lowered the asking price. He even entertained short-sale proposals of about \$290,000, but the property did not sell. The lender would not work with Applicant and his bank would not extend his residential home's equity line of credit.⁸ The lender eventually foreclosed on the property.⁹ Applicant felt he had no other options but to let the property go, and neither his sister or mother were in a position to help.¹⁰ The result was disappointing to Applicant, who had never had a problem with credit previously.¹¹ The bank ultimately sold the property in March 2010 for \$240,100. This left a deficiency of about \$250,000, an amount to be subtracted from the principle mortgage of \$392,000.¹² This appears to leave a mortgage deficiency of about \$152,000, although Applicant has not received a formal accounting from the lender. He has been led to believe he will be issued an IRS Form 1099 after the end of the year.¹³ Applicant has been unable to secure documentary evidence from the lender regarding many of those issues and is aware that it is his burden to submit such documentation.¹⁴

Applicant's primary asset is his house, which is worth about \$500,000. He testified that he asked the bank with which he had his business accounts to extend his home equity line to help make payments on his investment property, but he was rejected because of his recent cut in salary.¹⁵ After being rejected by two potential lenders, he felt he would have no success with other entities.¹⁶ Applicant sold another investment property at a net profit after expenses of about \$20,000. He applied this

⁶ Tr. 15-16, 20.

⁷ Ex. D (Tax returns, 2006-2009); Tr. 15-17.

⁸ Tr. 28, 30.

⁹ Tr. 21-22.

¹⁰ Tr. 23.

¹¹ Tr. 22.

¹² When the bank sold the property, Applicant's arrearage on his mortgage payments was about \$52,000. See Tr. 53.

¹³ Tr. 39-42. There is no evidence as to the amount, if any, of a deficiency remaining on the second mortgage. That issue is in litigation. See Tr. 37-38.

¹⁴ Tr. 39-44.

¹⁵ Tr. 28-29. Applicant provided no documentary evidence as to negotiations regarding this issue.

¹⁶ Tr. 32.

sum to his mounting bills, including his investment property debt.¹⁷ Applicant's records also show that he had about \$45,000 in stocks and bonds invested. He did not try to use those to make payments on the investment property because most of them were in his wife's name and they were derived from a retirement she had accrued through her workplace.¹⁸ Applicant had no available retirement savings, stock options, or any other options through his company to help him make payments on the property.

The second and final debt at issue is noted at SOR allegation ¶ 1.b, for a collection effort for \$985 owed to a telecommunications entity. Applicant testified that he disputed the balance five to six years ago, and requested they cancel service.¹⁹ He no longer has any documentary evidence regarding that dispute.²⁰ There is no evidence he recently has tried to dispute the entry with one of the three credit reporting bureaus or work with the law firm acting as a collection agent to settle the matter.

Applicant's income has recently improved. Tax forms show that he earned \$95,000 in salary in 2009. For 2010, he had earned over \$100,000 by August 10, 2010.²¹ Moreover, in late 2009, his company was awarded a new contract. More new contracts were awarded this year. The company currently has gross earnings of about \$6,000,000.²² Applicant has used his recent rise in income to satisfy old debt related to his 2008 drop in income. He recently was able to reduce about \$80,000 in credit card debt to about \$35,000.²³ Except for the foreclosure, Applicant's current credit report is mostly positive, reflecting a credit score of 653 after consideration of the foreclosure.²⁴ He stated that if the lender of the foreclosed property "came up to me next year [after the issuance of a 1099 form or other resolution of the balance owed] and said look, we want you to pay \$150,000 it would not be an issue."²⁵ Applicant laments his purchase of the property, noting that it was bad timing, not necessarily poor judgment.²⁶ With improved finances, he has not tried to negotiate further resolution of his debt on the

¹⁷ Tr. 66. The profits were used toward all of Applicant's mounting debts between about 2007 and 2008.

¹⁸ *Id.* In addition, to have used any of those funds would have incurred penalties, leaving a sum of little worth compared to the sum needed to protect the investment property. See Tr. 44..

¹⁹ Tr. 63-64.

²⁰ Tr. 64.

²¹ Tr. 45.

²² Tr. 55.

²³ Tr. 46.

²⁴ Tr. 55.

²⁵ Tr. 55.

²⁶ Tr. 58.

property, mostly due to his inability to have them work with him before a 1099 form is issued.²⁷

Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." ²⁸ The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant.²⁹

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the

²⁷ Tr. 60-61.

²⁸ See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

²⁹ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information). “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”³⁰ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting such classified information.³¹

Based upon consideration of the evidence, Guideline F (Financial Considerations) is pertinent to this case. Conditions pertaining to this AG that could raise a security concern and may be disqualifying, as well as those which would mitigate such concerns, are set forth and discussed below.

Analysis

Under Guideline F, “failure or an inability to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or an unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information.”³² The guideline sets out several potentially disqualifying conditions. Here, Applicant incurred several delinquent debts after his company lost a major contract. As a result, Applicant personally incurred a substantial reduction in salary. Delinquent debts related to a past due mortgage on an investment property which was ultimately subject to foreclosure and a telecommunications bill remain unresolved. They are at issue in this case. Given such facts, Financial Considerations Disqualifying Condition (FC DC) AG ¶ 19(a) (inability or unwillingness to satisfy debts) and FC DC AG ¶ 9(c) (a history of not meeting financial obligations) apply. With such conditions raised, the burden shifts to Applicant to overcome the case against him and mitigate security concerns.

Before 2007-2008, Applicant had no significant financial issues. Then, a company he started with his sister lost a major contract. The company’s income was cut in half. Applicant, who has a wife and several children, suffered a nearly commensurate reduction in salary, from about \$140,000 to approximately \$56,000 a year. His reduction in income led to his acquisition of considerable credit card debt. It also led to his inability to keep up with mortgage payments on one of his former investment properties. He ultimately lost that property in foreclosure. His past due balance is still noted on his credit report and the debt is unpaid. Applicant is awaiting final resolution of the balance owed after foreclosure and sale by the lender. This should result in the issuance of an IRS Form 1099. Meanwhile, a telecommunications bill from a few years ago, which Applicant believes was erroneously calculated, remains in collection,

³⁰ *Id.*

³¹ *Id.*

³² AG ¶ 18.

unpaid. There is no evidence Applicant has ever formally disputed the debt with any of the three leading credit reporting bureaus or that he has tried to resolve the issue with the current collection agent. Consequently, Financial Considerations Mitigating Condition (FC MC) AG ¶ 20(a) (the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment) does not apply.

Applicant's company's loss of a major contract directly impacted his own substantial reduction in salary. This reduction in salary led to his inability to pay all of his bills, a situation that was beyond his control. Some efforts were made to compensate for his loss, including the sale of one investment property. Those efforts, however, were insufficient to save the other investment property from foreclosure, and did not include documenting his disagreement over a telecommunications bill of nearly \$1,000. Given these facts, FC MC AG ¶ 20(b) (the conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation) and the individual acted responsible under the circumstances) applies to the extent Applicant tried to work with creditors affected by his abrupt reduction in salary.

There is no documentation showing that Applicant recently has received formal financial counseling. While there is no documentation showing that he has formally disputed the telecommunications bill, there is some evidence that he has tried to work with his mortgage lender, albeit unsuccessfully. FC MC ¶ 20(c) (the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control) applies to a limited extent due to his efforts in trying to resolve issues related to the foreclosed property.

By the time Applicant's finances began to rebound, it was too late to make sufficient progress on the investment property at issue. There is no documentation regarding the telecommunications account bill and no evidence the questioned bill was formally disputed. Applicant did testify, however, that he has substantially reduced a considerable amount of credit card debt not at issue in the SOR. Since an analysis under this guideline includes consideration of one's overall finances, I find that FC MC ¶ 20(d) (the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts) applies.

Applicant's financial difficulties between 2007 and 2009 were the direct result of a significant reduction caused by his business' loss of a major contract. This unavoidable situation was beyond his control, as was the bursting of the real estate bubble and the current recession. At the same time, Applicant is not a salaried employee. He is an entrepreneur whose income is directly related to the success of his business. Applicant is aware not only of business volatility, but of the transient nature of both business and government contracts. While he could not foresee recent economic conditions, it was poor judgment to invest in properties when he had insufficient reserved capital and/or assets to meet his monthly obligations should adverse business

conditions arise. Moreover, Applicant was aware of the burden placed on an applicant in these proceedings. The importance of documentation is emphasized in the pre-hearing information provided to applicants, and it was emphasized during the hearing. Despite such notice, Applicant failed to provide evidence before the close of the record that he has disputed, addressed, attempted to settle, or paid the telecommunications bill at issue in the SOR. While the facts presented help mitigate the creation of the debt at issue, Applicant's evidence fails to mitigate financial considerations security concerns.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). Under AG ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the "whole-person" factors. Applicant is a credible and personable businessman. He is mature and demonstrated considerable knowledge of his business. He is married and has several children. He is close to his mother and his sister, with whom he started his company. Before purchasing the property at issue, Applicant had experience investing in real estate. His problems regarding that property are similar to a growing number of applicants in terms of the difficulty in getting evidence that an IRS Form 1099 may be forthcoming. This problem is made more difficult by the fact such forms are only issued on or after the end of a calendar year. The property at issue is located in a region that has recently become known for having a depressed real estate market. Applicant was highly forthright relating his recent attempts to work with this mortgage lender and bank, and regarding a disagreement he had with his former telecommunications provider a few years ago.

The burden in these proceedings is placed squarely on the Applicant to mitigate the security concerns raised by the allegations. Here, a business downturn affecting Applicant's company adversely affected his income. As a result, he acquired significant credit card debt, as well as the two debts cited in the SOR. He did not have sufficient financial reserves or resources to honor his obligations in the event of a business downturn. This is particularly worrisome given his personal financial commitments and familial obligations.

Today, Applicant's finances have improved. Financially, he is almost back to where he was before 2007. He has made impressive progress on credit card debt not at issue in the SOR, although more effort is needed to completely address that debt. The two debts cited in the SOR, including the debt noted as being for approximately \$985, however, remain substantially unaddressed. There is no evidence that the telecommunications bill was formally disputed or that Applicant has recently tried to

revisit the debt. Without the IRS Form 1099 or some communication from his lender, the exact value owed on the investment property is uncertain, making it impossible to discern whether Applicant currently has sufficient funds to satisfy the sum ultimately calculated. While this dilemma is not of Applicant's making, AG ¶ 2(b) requires that any doubt concerning personnel being considered for access to classified information will be resolved in favor of national security. The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials. Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting such information. Consequently, based on the evidence presented, I find that financial considerations security concerns remain unmitigated. Clearance is denied.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F: AGAINST APPLICANT

Subparagraphs 1.a-1.b: Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant a security clearance. Clearance is denied.

ARTHUR E. MARSHALL, JR.
Administrative Judge